105 FLRR-1 26

104 LRP 31767

United States Department of Labor, Washington, DC and American Federation of Government Employees, Local 12. AFL-CIO

60 FLRA 68

Federal Labor Relations Authority

60 FLRA No. 18

WA-CA-02-0816

June 30, 2004

Related Index Numbers

44.1521 Compensation, Employee Services, Family Services, Day Care Facilities

72.512 Refusal to Bargain in Good Faith, Continuous Duty to Negotiate, Impact and Implementation Bargaining

41.4 Bargain Collectively

41.43 Bargain Collectively, Duties and Obligations of Parties

Judge / Administrative Officer

Dale Cabaniss, Carol Waller Pope and Tony Armendariz

Ruling

The FLRA dismissed the union's complaint. The union alleged that the agency violated the Labor Management Relations Statute by implementing a permanent child care subsidy program.

Meaning

A union may implicitly through inaction waive its right to bargain over a proposed change in conditions of employment.

Case Summary

The union charged the agency with violating the Labor Management Relations Statute by implementing a permanent child care subsidy program without giving the union notice or an opportunity to bargain. The parties agreed that before any such pilot program would become permanent, the other party would be given notice and an opportunity to bargain the terms within 30 days. The union presented a revised program to the agency several months after the agency had permanently implemented the pilot childcare program. The union's presentation was to be retroactive to the beginning of the permanency date. The AJ found that the union had waived its right to bargain over the pilot program. However, the agency violated the statute by failing to engage in mid-term bargaining over the childcare program. The FLRA dismissed the union's complaint. It had ample time to respond to the agency's proposed and permanent program and failed to do so. Furthermore, the union did not have the right to demand to bargain mid-term over the issue. It was required to wait until the expiration of the parties' master agreement to seek modifications.

Full Text

Decision and Order

Before the Authority: Dale Cabaniss, Chairman, and Carol Waller Pope and Tony Armendariz, Members

I. Statement of the Case

This unfair labor practice (ULP) case is before the Authority on exceptions and cross-exceptions to the attached decision of the Administrative Law Judge (Judge) filed by the General Counsel (GC) and the Respondent, respectively, and on the GC's motion to remand the case to the Judge. Each party filed an opposition to the other's exceptions. The Respondent did not file an opposition to the GC's motion to remand.

The complaint alleges that the Respondent violated § 7116(a)(1) and (5) of the Federal Service Labor-Management Relations Statute (the Statute) by implementing a permanent child care subsidy program without giving the Charging Party notice or an opportunity to bargain. For the reasons set forth below, we dismiss the complaint.

II. Background and Judge's Decision

A. Background

In the Spring of 2000, the parties began bargaining over a pilot child care subsidy program, pursuant to Office of Personnel Management (0PM) regulations that had been authorized by Congress in Pub. L. No. 106-58. On May 1, 2000, the Respondent presented the Charging Party with its final proposal in the form of a memorandum of understanding (MOU), which set forth the terms of the pilot program and, in the penultimate paragraph, stated the following:

This MOU will remain in effect through FY 2000 in accordance with the legislation. If Congress and/or 0PM reauthorizes the pilot program or makes the program permanent, within 30 days of such occurrence either party may notify the other in writing of the desire to reopen this matter for renegotiation. If neither party serves such notice, the MOU will remain in effect consistent with the term of the master Agreement.

Judge's Decision at 2 *(quoting* Respondent's Exh. 1, p. 3).

On May 17, 2000, the Respondent advised the Charging Party that "it appears we may have reached an impasse" and that it intended to implement its final proposal. Respondent's Exh. 2. The Charging Party did not respond to the letter or seek assistance from the Federal Service Impasses Panel (the Panel). Shortly thereafter, the Respondent implemented the pilot program, which was later extended for another fiscal year, and then made permanent on November 12, 2001 by Congress. *See* Pub. L. No. 107-67, Sec. 630 (2001). On December 12, 2001 the Respondent implemented a permanent program that mirrored the pilot program. At that time, the Respondent did not give the Charging Party notice of its intent to make the program permanent or offer to bargain with the Charging Party.

On March 5, 2002, the Union presented the Respondent with a proposed revised child care subsidy program, which was to be retroactive to November 12, 2001. *See* Judge's Decision at 4. The Respondent did not bargain, stating that the Charging Party had waived its right to bargain over the child care subsidy program by not requesting to bargain within 30 days of the effective date of the legislation that authorized the permanent program. *See id.* The Charging Party filed a ULP charge and the GC issued a complaint alleging that the Respondent violated the Statute by implementing the permanent program without giving the Charging Party notice or an opportunity to bargain.

B. Judge's Decision

The Judge found that the Charging Party waived its right to bargain over the pilot program by not invoking the services of the Panel in response to the Respondent's May 17, 2000 letter, which the Judge found was "an unambiguous notice to the Union of an impasse[.]" *Id.* at 8. The Judge rejected the GC's claim that such efforts would have been futile because the Respondent had already decided to implement the change. According to the Judge, "the Respondent's repeated invitations to the Union to bargain strongly suggest that the Respondent would have cooperated in the Panel's efforts to resolve the impasse." *Id.* at 8-9. In addition, the Judge found that "the Respondent was also free to implement the permanent program after it became apparent that the Union had not made a timely request to bargain within 30 days after the passage of the legislation authorizing the permanent program." *Id.* at 8. In this connection, the Judge found that the Respondent did not violate the Statute by failing to give the Charging Party adequate notice of the permanent program because the wording in the Respondent's final proposal was adequate to put the Charging Party on notice that, if it did not request bargaining within 30 days after Congress authorized the permanent program, then the pilot program would become permanent. *See id.* at 7.

Nevertheless, the Judge concluded that the Respondent violated the Statute by failing to engage in mid-term bargaining over the permanent child care subsidy program. In this regard, the Judge found that the terms of the child care subsidy program did not become part of the parties' collective bargaining agreement because the Charging Party did not sign

the MOU. The Judge also found that the parties' bargaining history did not evidence an agreement. The Judge rejected the Respondent's argument that the child care subsidy program was established by past practice, finding that "the practice that was not challenged by the Union was the pilot program." *Id.* at 12.

To remedy the violation, the Judge recommended a cease and desist Order, a retroactive bargaining Order, and a notice posting.

III. Positions of the Parties

A. GC's Exceptions

First, the GC disputes the Judge's finding that it would not have been futile for the Union to seek the services of the Panel. In this regard, the GC claims that the Respondent's May 17th letter "constitutes an unambiguous declaration that the Respondent would implement the pilot program without allowing time for the use of the [Panel's] impasse procedures." GC's Exceptions at 9.

Second, the GC argues that even if the Respondent lawfully implemented the substantive terms of its final proposal, the provision concerning bargaining over a permanent program was not lawfully implemented because it was not sufficiently related to the proposed pilot program. In this regard, the GC asserts that "bargaining proposals that are not related to the proposed change are not negotiable." Id at 11. According to the GC, the provision conflicts with the parties' agreement because the agreement permits mid-term bargaining on a quarterly basis and the Charging Party did not agree to modify the parties' agreement and negotiate a permanent child care subsidy program. *See id.* at 12. The GC also disputes the Judge's finding that the Respondent's final proposal constituted adequate notice of the Respondent's intent to make the pilot program permanent.

Finally, as to the Judge's recommended Order, the GC disputes the date for applying any subsequent agreement reached by the parties and the Agency official designated to sign the Notice. *See id.* at 15.

B. Respondent's Opposition

In response to the GC's futility argument, the Respondent asserts that the Charging Party "had ample opportunity ... to invoke the assistance of the [Panel] and failed to do so." Respondent's Opposition at 9. The Respondent also disputes the GC's claim that the Respondent was not permitted to change conditions of employment except in the manner prescribed by the parties' agreement concerning mid-term bargaining. In this connection, the Respondent asserts that the parties engaged in bargaining over the child care subsidy program to impasse and the Charging Party waived its right to bargain. *See id.* at 9.

The Respondent disagrees with the GC that the Charging Party was not bound by the provision in the Respondent's final proposal requiring 30 days' notice to reopen the agreement. In this regard, the Respondent asserts that the Charging Party's obligation to bargain over this provision is "beside the point" because the Charging Party was put on notice of the provision and waived its right to bargain. *Id.* at 10.

In addition, the Respondent disputes the GC's claim that the Charging Party did not receive adequate notice that the permanent program would be implemented. According to the Respondent, its final proposal provided adequate notice to the Charging Party that "if no request for bargaining [wa]s made, the existing program would simply be continued, as in fact it was. ..." *Id.* at 13.

C. Respondent's Cross-Exceptions

First, the Respondent argues that the Judge erred by finding that the Respondent had a duty to engage in midterm bargaining over the permanent child care subsidy program. According to the Respondent, this conclusion contradicts the Judge's findings that the Union had notice that the pilot program would become permanent upon proper authorization and that it waived its right to bargain. *See* Cross Exceptions at 7-8.

Second, the Respondent disputes the Judge's

finding that the implementation of the permanent program changed a condition of employment. According to the Respondent, making the program permanent did not change the substance of the program, and no change occurred because its "final [proposal] contemplated the exact future Congressional action that actually occurred[.]" *Id.* at 12.

Third, the Respondent disputes the Judge's finding that the child care subsidy program was not a past practice. In this connection, the Respondent asserts that its child care subsidy program has "continued unabated and unchanged" since it was first adopted. *Id.* at 14. The Respondent argues that the Union not only acquiesced "to the terms of the subsidy" program, but also acquiesced to "the terms of the MOU proffered by the [Respondent] as its final [proposal]." *Id.*

Fourth, the Respondent disputes the Judge's finding that its final proposal did not become a supplement to the parties' collective bargaining agreement. Specifically, the Respondent claims that "[w]hen the [U]nion failed to properly pursue bargaining, th[e] MOU then became a supplement to the parties' master agreement. ..." *Id.* at 16. Therefore, the Respondent claims that the subject matter of the child care subsidy program was "covered by" the parties' agreement, and thus not subject to further bargaining. *Id.*

D. GC's Opposition to Respondent's Exceptions

The GC asserts that the Union did not waive its right to bargain over the permanent program, and the Respondent did not provide the Union with adequate notice of the permanent program. *See* GC's Opposition at 3. The GC also asserts that the Judge correctly found that the permanent program was a change in a condition of employment for bargaining unit members because the pilot and permanent programs differ in duration.

The GC disputes the Respondent's claims regarding the existence of a past practice. Specifically, the GC asserts that "a party must know the parameters of a practice in order to give its consent to the practice." *Id.* at 5. The Respondent claims that the Union could not have given its consent to a permanent program even if it acquiesced to the temporary program because "the temporary nature of the pilot child care program that existed before the permanent program was a significant departure of the pilot program." *Id.*

The GC also contends that the Judge correctly found that the permanent program was not "covered by the parties' agreement." *Id.* at 6. In this connection, the GC asserts that the parties' agreement requires "that both parties sign a memorandum of understanding in order for it to become part of the term contract. ..." *Id.* at 7.

E. GC's Motion To Remand

The GC's motion requests that the case be remanded to the Judge with instructions to reopen the record so that the parties may introduce evidence on the issue of whether the actual or reasonably foreseeable impact of the alleged change on bargaining unit employees' conditions of employment was more than de minimis, and to issue a supplemental decision addressing that issue. *See* GC's Motion at 1. According to the GC, that issue was "not relevant" in the case below because there was no dispute that the issue of the child care subsidy program was substantively negotiable. *Id.* at 2. However, the GC claims that the issue is relevant now in light of the Authority's decision extending the applicability of the de minimis standard to situations where an agency is obligated to bargain over the substance of its decision to change a condition of employment. *SeeSSA, Office of Hearings and Appeals, Charleston, S.C.*, 59 FLRA 646 (2004) (Member Pope dissenting), petition for review filed, No. 04-1129 (D.C. Cir. Apr. 12, 2004) .

IV. Analysis and Conclusions

A. The Respondent did not violate the Statute by implementing the pilot child care subsidy program

It is long established that the duty to bargain under the Statute requires an agency to meet its obligation to negotiate prior to making changes in established conditions of employment. *SeeDep't of the Treasury, Bureau of Alcohol, Tobacco and Firearms*, 18 FLRA 466, 467 (1985) (BATF). However, the Authority has recognized that a union may waive its right to bargain over a proposed change in conditions of employment, either explicitly through agreement or implicitly through inaction. *See, e.g.,United States INS, Wash., D.C.*, 55 FLRA 69, 73 (1999) *(INS).* In this regard, an agency may implement changes in conditions of employment when a union fails to request bargaining within a reasonable period of time after being notified of proposed changes, fails to submit bargaining proposals within a contractual or other agreed upon time limit, fails to bargain, or fails to timely invoke the services of the Panel after the parties have reached impasse. *See id.;see alsoUnited States Dep't of the Air Force, Air Force Materiel Command*, 55 FLRA 10 (1998); *Dep't of the Air Force, Air Force Materiel Command, Wright-Patterson Air Force Base, Ohio*, 51 FLRA 1532 (1996). Under Authority precedent, a union is considered to have consented to proposed changes in conditions of employment when it fails to timely invoke the services of the Panel. *See id.* at 73 *(citingUnited States Immigration and Naturalization Serv.*, 24 FLRA 786, 790 (1986)).

Here, the GC does not dispute the Judge's findings that the parties reached impasse and that the Charging Party had a reasonable opportunity to invoke the services of the Panel, but did not do so. *See* Judge's Decision at 8. Therefore, applying the foregoing precedent, we find that the Respondent was entitled to implement its final proposal. In reaching this conclusion, we reject the GC's argument that, following receipt of the Respondent's May 17th letter, the Charging Party was not required to seek the Panel's assistance because such a request would have been futile. Nothing in the Respondent's letter indicates, and there is no reason to presume, that the Respondent would have refused to cooperate in impasse procedures, *see* Respondent's Exh. 2, particularly given that, with an exception not relevant here, an agency commits a ULP by failing to maintain the status quo and participate in impasse proceedings when negotiations reach impasse and a timely request for assistance is made to the Panel.[1]*See, e.g., BATF*, 18 FLRA at 468-469.

We also reject the GC's argument that the Respondent was not entitled to implement the provision requiring 30 days' notice to reopen the agreement because that provision was unrelated to the proposed change in conditions of employment. Although the GC correctly asserts that, under the Authority's precedent, parties are not obligated to bargain over proposals that are not reasonably related to the proposed change in conditions of employment, *see, e.g., Dep't of the Air Force, Headquarters, Air Force Logistics Command, Wright-Patterson Air Force Base*, Ohio 22 FLRA 502, 506 (1986), it has not demonstrated that the disputed provision is unrelated to the child care subsidy program over which the parties were negotiating. In this regard, Congress authorized funds for child care subsidy programs for one year, with the possibility of re-authorizing the program for another year or permanently. *See* Pub. L. No. 106-58, Sec. 642 (1999). Consistent with this guidance, the Respondent's proposal provided, in relevant part, that if the pilot program was re-authorized or made permanent by Congress then, "within 30 days of such occurrence[,] either party may notify the other in writing of the desire to reopen this matter for renegotiation. If neither party serves such notice, the MOU will remain in effect consistent with the term of the master [a]greement." Judge's Decision at 2 *(quoting* Respondent's Exh. 1, p.3). On its face, this provision addresses whether, and under what circumstances, the parties would agree to extend the child care subsidy program and, as such, the disputed provision reasonably relates to the Respondent's proposed pilot child care subsidy program.

B. The Respondent's final proposal is enforceable as part of the parties'

agreement

The Respondent excepts to the Judge's findings that the final proposal did not become a supplement to the parties' collective bargaining agreement because there was no express agreement and no history of bargaining over the permanent program. *See* Judge's Decision at 11. Although the Authority has held that an agency may implement a final proposal where the parties have reached impasse and the union does not invoke the services of the Panel, *seeINS,* 55 FLRA at 73, 74 n.10 *(citingUnited States Army Corps of Eng'rs., Phila. Dist.,* A/SLMR No. 673 (1976)), the Authority has not addressed the status of proposals implemented in this manner.[2]

In resolving this issue, we conclude, first, that the two factors the Judge found critical in rejecting the Respondent's argument that the implemented proposal became a part of the parties' agreement -- the lack of "express agreement" or bargaining history indicating agreement -- are not essential elements of a binding agreement under the Statute. In this regard, the impasse resolution procedures of the Statute are designed to facilitate and, if necessary, impose, a resolution of impasses. To this end, the role of the Panel "is to suggest and if necessary, order terms of settlement between agencies and unions when they cannot agree." *AFGE v. FLRA,* 778 F.2d 850, 852 (D.C. Cir. 1985); *see* 5 U.S.C. § 7119, et seq. Further, "[i] t is well established that the procedures of the Panel are part of the collective bargaining process and that any agreement, mandated or otherwise, resulting therefrom is a part of the collective bargaining agreement."Interpretation and Guidance, 15 FLRA 564, 567 (1984) *(citingInt'l Brotherhood of Electrical Workers,AFL-CIO, Local 121,* 10 FLRA 198, 199 (1982) and *AFGE, Locals 225, 1504, and 3723,AFL-CIO v. FLRA,* 712 F.2d 640, 646, n.24 (D.C. Cir. 1983)).

The Judge's rationale fails to acknowledge this statutory scheme and, therefore, does not provide a basis for distinguishing between contract terms imposed by the Panel and contract terms implemented after: (1) an agency bargains to impasse and provides the union with an opportunity to seek impasse resolution from the Panel; and (2) the union fails to seek the Panel's assistance. Our review of Authority precedent indicates that no such distinction is required. As the Authority has explained, as long as an agency implements terms that do not exceed those encompassed by its last proposal to the union, an agency has, in effect, " *satisfied* its bargaining obligation." *INS,* 55 FLRA at 73 (emphasis in original).

Second, we conclude that, as a matter of policy, contract terms implemented in situations such as this one should be treated as binding agreements. In this regard, finding that the terms are not binding could provide unions an incentive to not seek the Panel's assistance and, instead, attempt to require additional bargaining on issues over which impasse had previously been reached. This would hinder, not further, the purposes of the Statute.

Here, the Charging Party had an opportunity to, but did not, invoke the Panel's assistance to resolve the parties' impasse. Consequently, we conclude that the Respondent's properly implemented final proposal, in effect, became part of the parties' agreement.[3]

C. The Respondent was not required to give the Charging Party notice of and an opportunity to bargain over the implementation of the permanent child care subsidy program

The GC excepts to the Judge's determination that the Charging Party had proper notice that the pilot program would become permanent, and the Respondent excepts to the Judge's determination that implementing the permanent program changed a condition of employment.

Where an agency acts in accordance with an agreement, the agency is not required to provide notice to the union of its actions because the union, as party to the agreement, is presumed to know its terms. *See, e.g.,Equal Employment Opportunity Comm'n,* 52 FLRA 459 (1996) (if a matter is "covered by" an

agreement, then an agency may act unilaterally without providing notice and the union, as party to the agreement, is presumed to be familiar with the terms of the agreement). In these circumstances, the agency's action does not constitute a change in conditions of employment that gives rise to a duty to bargain. *See id.* at 471-72 (finding no obligation to bargain where change was already encompassed in parties' MOU).

The GC's claim that the Respondent was required to give the Charging Party notice of its intent to make the child care subsidy program permanent is based on its erroneous conclusion that the Respondent's final proposal did not, in effect, become part of the parties' agreement. Therefore, the GC's argument is without merit. Moreover, the GC does not deny that the disputed provision of the Respondent's final proposal permitted the Respondent to unilaterally implement the permanent program in the circumstances of this case. In this regard, the provision did not require the Respondent to notify the Union of any legislation extending the program, and there is no dispute that the Charging Party did not request to bargain within 30 days after Congress authorized the permanent program. As the Respondent's implementation of the permanent program was consistent with the express terms of its final proposal, we conclude, consistent with our precedent, that the Respondent's implementation of the permanent program was not a change in conditions of employment that gave rise to a bargaining obligation. *See, e.g.,United States Dep't of Justice, INS, Wash., D.C.*, 51 FLRA 1274 (1996) (respondent did not violate Statute by unilaterally changing condition of employment consistent with parties' agreement).

D. The Respondent was not required to bargain midterm over the permanent program

The Authority has held that, absent a reopener clause, parties are not permitted to demand mid-term bargaining over matters that are covered by an agreement. *See, e.g.,United States Dep't of Health and Human Serv., SSA, Bait., Md.*, 47 FLRA 1004, 1013 (1993). Here, the Judge found that the Respondent violated the Statute by failing to engage in mid-term bargaining because "the final offer contain[ed] no reference to mid-term bargaining[.]" Judge's Decision at 10. However, the procedures for requesting bargaining over the permanent child care subsidy program were established in the Respondent's final proposal, which is binding on the parties. The relevant provision of that proposal states that, "[i]f neither party serves such notice, the MOU will remain in effect consistent with the term of the master [a]greement." *Id.* at 2. There is no dispute that the Union did not serve notice to the Respondent of its desire to bargain within the allotted time. Therefore, the Union did not have the right to demand to bargain mid-term over the issue, and was required to wait until the expiration of the parties' master agreement to seek modifications in the program.

V. Order

The complaint is dismissed.[4]

[1]The exception is that an agency is not precluded from changing the status quo consistent with the necessary functioning of the agency. *SeeBATF*, 18 FLRA at 469.

[2]We note that there is no relevant private sector precedent because, in the private sector, there is no mandatory impasse resolution process similar to the Panel. *Seegenerally* Hardin, Developing Labor Law at 925-32 (4th ed. 1995); *Nat'l Labor Relations Bd. v. Ins. Agents Int'l Union*, 361 U.S. 477, 488-89 (1960) (describing the role of economic weapons in private sector bargaining).

[3]In light of this conclusion, we do not address the Respondent's exception concerning past practice.

[4]In light of this decision, we deny the GC's motion to remand the case to the Judge to apply the de minimis standard.

Statutes Cited

5 USC 7116(a)(1)
5 USC 7116(a)(5)
5 USC 7119

Cases Cited

59 FLRA 646
18 FLRA 466
55 FLRA 69
55 FLRA 10
51 FLRA 1532
24 FLRA 786
22 FLRA 502
778 F.2d 850
15 FLRA 564
10 FLRA 198
712 F.2d 640
361 U.S. 477
52 FLRA 459
51 FLRA 1274
47 FLRA 1004

